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Supreme Court of the United States

OCTOBER TERM, 1944

No. 788

HARRY BRIDGES,

Petitioner,

against

I. F. WIXON, as District Director, Immigration and Naturalization Service, Department of Justice.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner HARRY R. BRIDGES respectfully alleges:

A

Summary Statement of Matter Involved

Petitioner is an alien who entered legally as an immigrant seaman from Australia in 1920 and who since has continuously resided in the United States (R. 791-2).

In 1938, and after several exhaustive investigations of his status, none of which had resulted in action against him, a Labor Department warrant for petitioner's arrest was issued, charging him with membership in and affiliation with proscribed organizations (R. 503). Hearings on

that warrant were held before Dean James M. Landis of the Harvard Law School beginning in July 1939 (R. 504): Dean Landis declined to credit the testimony offered against the petitioner; his findings of fact and conclusions of law were accepted by the Secretary of Labor; and the warrant was cancelled (R. 75).

In June 1940 the applicable statute was amended (Act of June 28, 1940, 54 Stat. 673)—with petitioner's situation in mind (86 Cong. Rec. 9031). A second warrant for petitioner's arrest in deportation proceedings then issued, on February 12, 1941 (R. 771-2). Hearings were held before Judge Charles B. Sears, who differed from Dean Landis and proposed findings bringing the petitioner within the statute authorizing his deportation: that he had been a member of and affiliated with the Communist Party, which Judge Sears found to advocate violent overthrow of the Government; and that he also had been affiliated with the Marine Workers Industrial Union (MWIU), found to be an affiliate of the Communist Party (R. 337-41).

Exceptions were filed pursuant to the regulations of the Immigration and Naturalization Service; briefs submitted, and the case argued orally before the Board of Immigration Appeals of the Department of Justice (R. 369). On January 3, 1942, the Board unanimously rejected the proposed findings (R. 367-492). The Board delivered a comprehensive written opinion (R. 367-492). The warrant of arrest was ordered cancelled and the case closed. Execution of the order was stayed pending further order of the Attorney General or of the Board (R. 492).

On May 28, 1942 the Attorney General reversed the order of the Board and directed the petitioner's deportation (R. 65-110). The Attorney General had not given notice that he had ever assumed jurisdiction of the case, and the parties had not been given opportunity to present their views to him. A petition for a hearing before him was promptly filed, on May 31, 1942, and was denied by him four days later (R. 679-87).

Appellant then petitioned the United States District Court for the Northern District of California for a writ of habeas corpus (R. 2-17; 21-62). The writ was denied by District Judge Martin I. Welch (R. 758-9). His opinion is reported in 49 F. S. 292 (R. 723-59).

Appeal was then taken to the United States Circuit Court of Appeals for the Ninth Circuit (R. 759). By a divided court (3 to 2), the order of the District Court was affirmed, on June 26, 1944 (R. 7810). Wilbur, J. wrote for affirmance in an opinion in which Matthews, J. concurred (R. 7770-7793). Judge Stephens delivered a separate concurring opinion in which Wilbur and Matthews, JJ. also concurred (R. 7793-4). Judge Healy dissented, in an opinion in which Judge Garrecht concurred (R. 7794-7809). The opinions are reported in 144 F. (2) 927 (also R. 7770-7809).

A petition for a rehearing was filed on July 26, 1944. It was principally addressed to the views expressed by the majority concerning their review of the evidence. The petition was denied in an opinion by Judge Stephens dated September 27, 1941 (R. 7811-2). Thereafter, and on November 1, 1944 Judge Stephens without further application by counsel amended the text of his opinion on rehearing.

Proceedings for deportation are stayed by order of the Circuit Court of Appeals for the Ninth Circuit, pending the present petition (R. 7813).

B

Jurisdiction

The jurisdiction of this Court rests on section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347).

C

Statute and Regulations Involved

Section 2 of the Act of October 16, 1918, as amended June 5, 1920, and June 28, 1940, so far as relevant to this proceeding, provides:

> Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided by law. The provisions of this section shall be applicable to the classes of aliens mentioned in this act, irrespective of the time of their entry into the United States. (54 Stat. 673; 8 U. S. C. § 137[g].)

Section 1 of the Act thus referred to, enumerates the following aliens, among others:

> Aliens who * * * are members of or affiliated with any organization, association, society or group that believes in, advises, advocates, or teaches: (1) The overthrow by force or violence of the Government of the United States * * *, (3) The unlawful damage, injury or destruction of property, or (4) Sabotage— (41 Stat. 1009; 8 U. S. C. § 137[c]).
>
> Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d). (41 Stat. 1009; 8 U. S. C. § 137[e].)

The text of the statute and of the pertinent Regulations of the Immigration and Naturalization Service appear in the appendix to this petition (*infra*, pp. 53-70).

D

Questions Presented and Reasons Relied on for the Allowance of the Writ

Issues of far-reaching importance to every alien resident in this country are presented. Petitioner has been ordered deported upon evidence so unsubstantial that the finding against him is a denial of due process of law guaranteed by the Fifth Amendment. The order of deportation, moreover, is demonstrably the result of an unrelenting persecution of petitioner extending over almost a decade, in the course of which outstanding infractions of ordinary conceptions of due process of law have been committed. And the decision below in effect denies that the rights of free speech and association guaranteed under the First and Fifth Amendments extend to aliens in deportation proceedings; in fact it denies petitioner those rights.

I

The facts, which will be fully discussed in Point I of the accompanying brief, cannot support any finding against the petitioner of unlawful membership in or affiliation with any proscribed organizations.

The present proceeding is the second large scale trial of the charges against petitioner. Almost forty witnesses have appeared against him in the two proceedings; their testimony has been rejected, as untrustworthy, or false, or mistaken, with only these exceptions:

(a) A witness named Lundeberg, admittedly an enemy of petitioner, gave the evidence now principally relied on. He testified that petitioner had admitted membership in the Communist Party during a conversation with him in 1935. Lundeberg's own prior statements made on three separate occasions and in formal circumstances are in

contradiction of his testimony on the stand, which was extracted from him only with difficulty and through repeated leading questions.

(b) Certain evidence against petitioner was ascribed to a witness named O'Neil, although it was completely repudiated by him on the stand. As we shall show, reliance upon this evidence, even assuming it had any weight, is error so flagrant as to offend due process of law.

(c) Certain actions and declarations by the petitioner, particularly his opposition to red-baiting in the labor union movement—a charge freely admitted by him—, and his association with known Communists were found to constitute a "pattern of conduct" demonstrating affiliation with the Communist Party.

(d) Evidence, also uncontradicted, that the petitioner, during the course of an important strike on the west coast waterfront in 1934 accepted the aid of the Marine Workers Industrial Union (MWIU), was held to show his affiliation with that organization. Evidence that the petitioner was once one of the editors of a newspaper, "The Waterfront Worker" which the MWIU controlled for some eight months was held to support that conclusion. The proof in this respect, which is most involved, is fully analyzed in the opinion of the Board of Immigration Appeals where it is shown that petitioner did not become associated with the paper until MWIU control had ceased.

Such is the sum of the proof—of those fragments which survived unavoidable rejection of most of the Government's proof. The courts below were at pains to avoid endorsement of it; rather they disclaimed judicial responsibility. But an order of deportation must be based upon substantial evidence such as is capable of carrying conviction to a reasonable mind, and cannot consistently with the requirements of due process be justified upon evidence such as is here presented.

The administrative authorities have commented upon the present attitude of this Court in requiring substantial evidence to support findings requiring deportation (p. 23 *infra, fn.*). The courts below have failed to take note of that attitude.

II

Since 1934 when he demonstrated his abilities as an aggressive and effective labor leader, the petitioner has been subject to a series of departmental investigations looking to his deportation. Then in 1939 there was an elaborate trial of the issues before Dean Landis, and petitioner was cleared of all charges.

The matter was not permitted to rest there. The statute was then amended in order to furnish a pretext for further proceedings against him. When those proceedings transpired, they were *res judicata* because they embraced the same issues of fact, the same lines of proof, and even much of the same evidence which had been gone into fully before Dean Landis. Ordinary conceptions of fairness embraced in the due process, *ex post facto* and double jeopardy provisions of the United States Constitution were thus overriden. The bringing of charges based upon the MWIU constituted moreover gross discrimination in fact against petitioner.

The proceedings were conducted by Government counsel in a most prejudicial spirit, and inexcusable tactics were followed. Error was committed in respect of O'Neil so flagrant as itself to constitute a denial of due process of law. And Mr. Attorney General Biddle's manner of assuming jurisdiction of the case and disposing of it without notice or opportunity to be heard constitutes a further offense to accepted principles of common fairness and a violation of due process.

Petitioner was entitled to due process of law in these proceedings to deport him. Viewed in their totality and against their full background, the proceedings violated the due process provision of the Fifth Amendment. The double jeopardy and *ex post facto* provisions are also involved (Const. Art. I, sec. 8).

III

The deportation statute as here construed and applied denies the petitioner rights of freedom of speech and association guaranteed under the First and Fifth Amendments.

The Government expressly disavows any suggestion that the petitioner personally advocated proscribed doctrines. There is no proof that he subscribed to any such doctrines, or indeed understood the Communist Party to entertain them.* There is no suggestion that he committed any overt act. The statute has been applied simply to the bare fact of alleged membership. There is no proof of any clear and present danger, or—further—that the Communist Party advocates violent overthrow of government within the realizable future. To deport for membership in such circumstances, for mere *association* without more, is a denial of the essential liberty guaranteed by the First and Fifth Amendments, which liberty petitioner may not be denied because of his alien status. This Court has not had occasion directly to pass upon the constitutionality of a statute proscribing mere membership in an organization found to advocate violent overthrow of government—whether or not that advocacy threatens imminent danger to our institutions.

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* Petitioner will also argue, if this petition be granted, that the proof does not justify the finding that the Communist Party or the MWIU advocates doctrines which the statute proscribes. The finding expressly rests upon excerpts from four documents, three of which were analyzed in *Schneiderman* v. *United States*, 320 U. S. 118, with conclusions in favor of the petitioner there.

That constitutional question becomes of acute importance in the light of the Government's further position, which the courts below seem to have sustained, that the petitioner may be deported for speech or conduct which in the case of a citizen would constitute an exercise of the rights of free speech and association guaranteed in the First and Fifth Amendments. Thus the status in this country of a large number of aliens is at stake—involving not merely their past associations or memberships, but also the manner in which they today conduct their lives in the community. Indeed the deeper issue is involved, whether the Constitution will thus permit of deportation for exercise of any traditional liberties—religious, political, or economic.

Nor may the order of deportation properly rest upon the findings as to affiliation. The evidence already stated so far as reasonably material, establishes no more than that the petitioner was active in promoting the legitimate ends of his union and that in so doing he cooperated on appropriate occasions with the Communist Party and the MWIU, along with other unions of unchallenged status. If the statute is to be interpreted so broadly as including such activity, then it is unconstitutional in that again it denies the essential liberties of speech and free association guaranteed by the First and Fifth Amendments, as well as the protection of the due process clause of the Fifth Amendment. The court below construed the statute as requiring petitioner's deportation for these activities. The decision is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *U. S. ex rel. Kettunen v. Reimer*, 79 F. (2) 315, where the interpretation of the statute was such as to exclude intermittent association undertaken for independent purposes.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Ninth Circuit requiring that Court to certify

and send to this Court a transcript of all the proceedings of such Circuit Court of Appeals for the Ninth Circuit had in this case; that the order of such Circuit Court of Appeals be reviewed and determined by this Court, and the order finally reversed; and that your petitioner be granted such other and further relief as may be proper.

HARRY R. BRIDGES,
By: CAROL KING,
His Counsel.

Dated: December 27, 1944.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The required references to the opinion of the court below, to the jurisdiction of this Court, and to the applicable statute and regulations are made in the accompanying petition (pp. 3-4, *supra*).

Petitioner was entitled to due process of law in these deportation proceedings (*Kwock Jan Fat* v. *White*, 253 U. S. 454 at 457-8; *Chin Yow* v. *U. S.*, 208 U. S. 8; *The Japanese Immigrant Case*, 189 U. S. 86; *Kessler* v. *Strecker*, 307 U. S. 22 at 34). Action against him may not rest upon arbitrary administrative fiat; evidence upon which the reasonable mind can justify action against him is required. We discuss the evidence and the applicable principles as to the necessary *quantum* of proof in Point I.

Due process embodies other fundamental principles of fairness: to be confronted by the witnesses and to have opportunity to cross-examine; to protection from prejudicial error committed through administrative reliance upon flagrantly incompetent evidence; to be free of the menace of successive trials concerned with the same issue; to equal administration of the law, without discrimination against him alone; to a fair hearing conducted in accordance with the rules of the administrative body; to a fair and dispassionate presentation of the evidence; and to representation by counsel in the tribunal which finally adjudicates his rights. We shall discuss in Point II the successive infringements of these fundamental rights committed against petitioner in the present proceedings.

That the essential liberties of free speech and free association, to which the petitioner as well as the citizen is entitled, were here denied him, is shown in Point III.

POINT I

Deportation upon the evidence presented in these proceedings offends due process of law.

The present proceedings, begun in 1941, have their roots in events antedating the present warrant. It was in 1934 that the petitioner took an active part in the waterfront strike, as chairman of the Joint Committee of the participating unions (R. 237). And it was then that "the interests which he had antagonized" began a relentless and determined effort to deport him.[1] As a result of continuous pressure from these sources, the authorities made several investigations even before 1938. They resulted in petitioner's favor:

> "In short, whenever any legal ground for the deportation of Bridges has been brought to the attention of the Department of Labor, it has been investigated, but invariably it has been found that he was in the clear, and that his status as an immigrant was entirely regular."[2]

Nevertheless a warrant issued for petitioner's arrest in 1938 for alleged membership in and affiliation with proscribed organizations (R. 503).

The hearings on the warrant, before Dean James M. Landis of the Harvard Law School, ran for eleven weeks.

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[1] The phrase quoted is from the report in 1936 of the Immigration Service (R. 659). The wide range of persons and organizations so involved is described in Dean Landis' opinion at R. 551-3: the Associated Farmers; the Industrial Association of San Francisco; the police departments of Los Angeles and Portland; several private undercover agents; a division of the American Legion under Harper Knowles; etc. See also Judge Healy, dissenting below at R. 7795-7.

[2] 1936 Immigration Service Report at R. 661; see also testimony of Commissioner of Immigration MacCormick, 74th Cong., 2nd Sess., in hearings before Appropriations Subcommittee (1936) 99-100.

Twenty witnesses were heard; the testimony taken covers 7,724 pages. Counsel were in attendance (R. 504); and written briefs were submitted. The nature of the proof suggests the reasons for the outcome of the earlier investigations. The evidence was given through a succession of perjurers, chronic liars, renegade Communists, and labor spies.

Dean Landis rejected the testimony of all of them.[1] He found no credible evidence to support the view that the petitioner had ever been a member of the Communist Party and found therefore that he was not a member at the time the warrant issued.

In 1940 the statute was amended so as to give pretext for renewed action against petitioner (see pp. 26-7, *infra*). Accordingly, on February 12, 1941 the present warrant issued.

The hearings, before Judge Sears, were of the same magnitude as before Dean Landis. Eighteen witnesses were heard; and equivalent time was consumed and testimony taken—two and one-half months and 7,546 pages. The subject matter of the testimony was substantially the same as that presented before Dean Landis. On the issue of membership, Judge Sears credited only one witness if we exclude the testimony of two departmental employees concerning the statement of a witness which the witness himself contradicted (*cf.* R. 256-9, 259-71). Nevertheless, Judge Sears drew conclusions bringing petitioner within the statute.

By 1941 the petitioner had been under virtually continuous investigation by efficient and determined if not vindictive groups for some seven years. Yet, out of the

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[1] He described one as a "self-confessed liar" (521); the testimony of another as "almost unique" in "evasion, qualification and contradiction" (R. 549); another as having "almost pathological" tendency "toward prevarication" (R. 612); while another merely "lied when he dared to" (R. 556; see also R. 549, 588, 612, 556, 553, 571-2, 507, 575-6).

volume of evidence presented through two score witnesses in the two hearings, there remains as the basis for the finding against petitioner: (a) the evidence of petitioner's admitted enemy Lundeberg—evidence contradicted by Lundeberg's own prior statements and extracted from him with difficulty through repeated leading questions; (b) the incompetent alleged statement of O'Neil—acceptance of which, we shall show, itself offends due process; (c) certain charges centering on petitioner's part in editing the Waterfront Worker—charges neither supported by facts, nor consistent with a proper understanding of the scope of permissible union activities; (d) some proof of petitioner's cooperation in 1934 with the MWIU and his sympathetic attitude to some of its aims and of the Communist Party—most of which is freely admitted; (e) Mr. Attorney General Biddle's attempt to buttress the finding of membership by taking—"as a whole" and not individually—the testimony of certain other witnesses whose individual testimony had been found by Judge Sears to be (in the words of the Attorney General) "inconclusive, unreliable or contradictory" (R. 97).

It is apparent that, as was said below by Judge Healy, "The most significant feature of the inquiry * * * is the paucity of the evidentiary product as contrasted with the magnitude of the effort expended in producing it" (R. 7798).

It is also apparent that each writer of an opinion below was quick to disclaim any responsibility for the finding upon the evidence here.[4] Instead the majority

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[4] Judge Wilbur said that his conception of the limited function of the Court prevents it from attempting "the righting of every governmental act which the judges regard as wrong" (R. 7790). Judge Stephens, in whose opinion the other two members of the majority concurred, stated that the evidence did not leave with him "the pleasurable satisfaction that * * * the truth has been revealed" (R. 7794).

opinions put forward the *apologia* that the judicial function is limited to determining if "any" evidence (R. 7777) or "some" evidence (R. 7794) has been presented. Judge Healy for the dissenting members of the court below stated bluntly that one part of the evidence crucial to the Attorney General's conclusion "would be condemned and proscribed without hesitation by any American court" (R. 7809).

The Attorney General's position in the administrative process did not invest him with special competence to reach a decision on the facts. Expert judgment upon matters foreign to ordinary judicial experience was not called for; if any expert competence were involved, it would rest with the Board of Immigration Appeals. Nor did the Attorney General see the witnesses; indeed he placed his conclusion in part upon the evidence of seven witnesses taken "as a whole", nothwithstanding that Judge Sears who had seen them had not seen fit to credit their evidence individually.

The finding of membership in the Communist Party.

1. *Lundeberg.* Lundeberg is a prominent west coast labor leader and is head of the union which in maritime affairs on the west coast is rival to the petitioner's. Judge Sears found Lundeberg "is strongly biased" against petitioner (R. 258). On three separate occasions over a period of years prior to the present hearing, he told the federal authorities that he had no information to indicate that petitioner had ever been a Communist (R. 7344-5; 7340-1; 7346; 7349). At the present hearing he gave testimony that in the summer of 1935, at a dinner in Bridges' home, Bridges asserted that he was a member of the Communist Party (R. 7265-7268). The statement is supposed to have been made during the course of an attempt to persuade Lundeberg to join the Communist Party. The petitioner denied any such statement (R. 7576).

Lundeberg related the conversation three times during his direct testimony. The story grew in the retelling. Not until the third version, and only after pointed and obviously leading questions, did he bring forward any assertion by petitioner of Communist Party membership. Discrepancies in his testimony, unnecessary to consider now, are closely considered in the opinion of the Board of Immigration Appeals[5] (R. 468-89).

It is this testimony alone to which the majority of the court below pointed in support of their view that "some" evidence existed for the finding of membership (R. 7782-3, 7787-8).

2. *O'Neil.* The effort to find support for a finding against the petitioner in O'Neil's testimony is itself telling commentary on the nature of the proof.

O'Neil was called as a witness for the Government and was asked whether he had ever seen the petitioner pasting assessment stamps in a Communist Party membership book. O'Neil said he had not. He was then asked whether petitioner had ever reminded him to attend Communist meetings. He said petitioner had not. Thereupon the Government produced two witnesses who testified that O'Neil had made a statement to such effect to them—a statement neither sworn to nor signed by him. One of the witnesses was a stenographer employed by the Federal Bureau of Investigation (R. 3102), the other was the Special Assistant

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[5] The Attorney General deemed it significant that three persons supposed to have been present at the dinner were not called as defense witnesses. The only one of them said by Lundeberg to have been present when the alleged admission was made was Sam Darcy, a prominent Communist. It is difficult to understand why, either as a legal or a practical matter, petitioner rather than the Government should have had the burden of bringing Darcy to the stand—particularly since the record indicates that the Government may have been in possession of evidence showing that Darcy was not present in San Francisco during the summer of 1935 since he was in Russia in July, 1935 (Gov. Ex. 244; R. 2178).

to the Attorney General in charge of the Immigration Service (R. 5255). O'Neil did not deny having made a statement; he denied, however, that he had ever made the particular statement attributed to him, and emphatically asserted that his statement had been to the contrary (R. 2998-3072, 3090).

The Presiding Inspector was able to conclude from this proof that petitioner was a member of the Communist Party (R. 259-271).

Apart from its failure to carry conviction, this evidence seems plainly incompetent when employed as it was as affirmative proof (see p. 33, *infra*). The Board of Immigration Appeals (R. 433-68), and the District Court (R. 752-5), both rejected the evidence as wholly incompetent.

3. *The evidence of membership "as a whole"* (R. 98). Evidence was offered to show that the petitioner had attended Communist meetings. None of it withstood scrutiny at the hearings, and Judge Sears rejected it as "inconclusive, unreliable, or contradictory" (R. 97). Mr. Attorney General Biddle ruled, however, that "because of its volume", this evidence "taken as a whole * * * cannot * * * be completely disregarded", and he relied upon it.

4. There is no other surviving proof as to membership.

The finding of affiliation with the Communist Party

One witness testified that the petitioner had spoken favorably of the American Youth Congress and the National Students Union, in appreciation of their aid to his union in the 1934 strike (R. 1434-5). According to another witness, the petitioner once said that "the only way that a young fellow could get along in the labor movement was to join the Communist Party" (R. 7377). A third witness, supporting the ex parte written statement of her deceased

husband, testified that the petitioner had discussed with some Communists the policy expressed in a telegram to one of his local union officials (R. 1961, 1991). Neither did he object to the publication of Communist releases in a trade union newspaper where the releases were helpful to his union (R. 5870). Admittedly, he has steadfastly opposed red-baiting in the trade union movement (R. 97).

From these circumstances—and particularly from petitioner's opposition to red-baiting which Judge Sears thought was consistent with the alleged Communist policy of "boring from within" (R. 326-8)[6]—Judge Sears drew the inference that the petitioner was affiliated with the Communist Party. In discussing petitioner's "pattern of conduct", Judge Sears did not refer to the many differences in policy—as expressed in action—between the petitioner and the Communist Party. (See the opinion of the Board of Immigration Appeals at R. 427-31.)

Much of this evidence was first introduced at the hearing before Dean Landis (R. 75, n. 6), and was read into the record at the present hearing (R. 3217 ff.). Dean Landis found that it did not establish affiliation for he drew the proper distinction, not drawn in the present proceeding, between a casual intermittent relationship and one involving a continuing cooperation embracing mutual responsibilities (R. 513 and see p. 45, *infra*).

[6] Cf. the report of Dean Landis:

> "Bridges has also refused to adopt any policy whereby his unions would exclude or discriminate against any person upon the ground of membership in the Communist Party. Instead, he has actively sponsored a policy of nondiscrimination. The necessity for adoption of the policy of nondiscrimination arose. Bridges claimed, from employers' activities that charged every militant policy pursued by the unions was communistic. For that reason it was alleged that anti-red-baiting resolutions were commonly adopted by the various unions that Bridges influenced" (R. 627; *cf.* also R. 632-633).

The finding of affiliation with the MWIU

The MWIU was a trade union of American seamen and longshoremen (R. 3257) which went out of existence in 1935 (R. 205). Prior to 1934, because of its affiliation with the Trade Union Unity League (TUUL) which was considered a Communist organization, its members had been held deportable (R. 205-6; *Greco* v. *Haff*, 63 F. (2) 863—C.C.A.9). However, it effected a reorganization in its relations in 1933, and the Immigration Service ruled early in 1934 that membership in the MWIU was no longer ground for deportation (R. 60, 3689 ff. especially 3696). Whatever its dominating influences may have been, there is no question that it was an active trade union until shortly before its dissolution.

The evidence of petitioner's relations with it was in the main read into the record from the transcript of the first proceeding (R. 3245 ff.). It covers two separate items: the incidents of the 1934 strike (R. 421), and the "Waterfront Worker" (R. 380-420).

1. *The 1934 Waterfront Strike.* In 1934 the petitioner was an influential member of the International Longshoremen's Association, an AF of L union (R. 5739) (the Pacific Coast District of which has since been chartered by the CIO as the International Longshoremen & Warehousemen's Union—R. 238). The union participated in the coastwise strike which began May 9, 1934 (R. 5778)—a successful strike resulting in the removal of substantial grievances, the legitimacy of which is not denied (R. 84, 234-5, 325). Petitioner was chairman of the Joint Strike Committee, comprising all the unions involved (R. 5781).

During the course of the strike petitioner enlisted and accepted the cooperation of the MWIU (R. 5778-81, 5783). He similarly had the cooperation of a number of other unions not claimed to have been Communist dominated

(5815, 5785), of Jackson, an MWIU organizer (R. 249, 3266); and of Darcy (R. 250). He accepted the aid of the Communist west coast paper, the Western Worker (R. 251), as he accepted the aid of the Catholic Leader (R. 6485). He urged seamen who were members of the International Seaman's Union, which was recalcitrant in supporting the strike, to leave that union and to join the MWIU (R. 3257, 3258).[7] He opposed a joint resolution of all unions repudiating Communist support, and he discussed his attitude with Darcy (R. 250). He sought to have MWIU delegates on the Joint Strike Committee (R. 6348).

Apart from the evidence as to the "Waterfront Worker," which we next consider, this constitutes the substance of the evidence on the question of affiliation with the MWIU.[8] Petitioner did not deny these facts, on the contrary he asserted that they illustrated his considered philosophy: that he is above all interested in the fortunes of his union; and that he will seek cooperation from any helpful source when its interests are at stake (R. 374-5) because effective trade union management requires no less.

The proof of these facts was also made before Dean Landis (R. 375). His conclusions were opposed to those reached in the present proceeding. "Persons engaged in bitter industrial struggles," he said, "tend to seek help and assistance from every available source" (R. 635). In truth an inference of affiliation can be drawn from them only through a conception of the meaning of affiliation so mistaken as to amount to a denial of liberties constitutionally guaranteed (*cf.* R. 5810-12).

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[7] The petitioner changed his attitude when the ISU joined the strike. Then he was instrumental in the transference of many members from the MWIU to the ISU. In 1935, the MWIU disbanded (R. 3262-4).

[8] Judge Sears also relied upon subsequent writings of Communist apologists who sought to magnify Communist influence in the 1934 strike by claiming intimate association with the petitioner (R. 251-5).

2. *The "Waterfront Worker."* The Waterfront Worker was a mimeographed paper published in San Francisco from December 1932 until some time in 1936 (R. 238). It had no fixed editorial board, and the methods of editing and publishing it were most informal (R. 381n, 3234, 5761). At its start it was edited by members of the MWIU, and it was urged and found below that the petitioner, who admittedly participated in its editing and publication *after* September 1933, had worked with that group from the beginning in December, 1932. Petitioner's evidence was that from the outset and before his connection with it the paper was unsuccessful; that it had lapsed, and had then, around September, 1933, been revived by a group of which the petitioner was a member (R. 3234, 6172), and which neither included any member of the MWIU nor operated with financial or any other aid from the MWIU (R. 5772).

The proof offered on both sides of this simple question was most complicated. The Board of Immigration Appeals undertook the laborious task of unravelling it and by careful analysis of the objective facts, particularly the issues of the Waterfront Worker in evidence, demonstrated the errors of the Presiding Inspector's conclusions (R. 380-420).[9]

3. There is no other surviving proof or alleged proof as to petitioner's affiliation either with the Communist Party or the MWIU.

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[9] A subsidiary finding was also made that the publication was an instrument of the MWIU and hence of the Communist Party until it ceased publication in 1936 (R. 244-5. The date here given by Judge Sears must be incorrect as the MWIU went out of existence in 1935—R. 205). However, the finding admittedly depends upon the numbers published before September 1933. The opinion of the Board of Immigration Appeals examines the subsequent issues of the paper, and dispels all suggestion of support for the finding (R. 384-420).

Substantial Evidence is Required.

There should be no doubt as to the *quantum* of the necessary proof. The due process clause of the Fifth Amendment requires the Court to satisfy itself that substantial evidence, of a quality to carry conviction to a reasonable mind, supports any finding from which deportation follows.[10] Even where the finding of an administrative board is made conclusive "if supported by evidence", the reviewing court has the duty to examine the evidence to determine whether it is "substantial", that is to say, whether it has that quality which makes an impression on reason and can *induce conviction.* As was said in *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300:

> "Section 10(e) of the Act provides: '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' * * * and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

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[10] The judicial attitude in deportation cases must accommodate the fact that aliens now present in this country are generally of long residence, that they have acquired American families and in general have put their roots down in this soil, and that their deportation should rest only upon adequate evidence and upon findings fairly reached.

There must be "enough evidence to fairly sustain the finding * * *" (*Lewis* v. *Frick*, 233 U. S. 291 at 297). (See also *NLRB* v. *Sun Shipbuilding & Drydock Co.*, 135 F. (2) 15 at 25— C. C. A. 3; "*Administrative Procedure in Government Agencies*", Final Report of the Attorney General's Committee 1941, p. 88.)[11]

Although language may be found in the opinions in deportation cases pointing in varying directions, this requirement for substantial evidence is illustrated in a number of decisions.[12]

Such a requirement is peculiarly acute when important constitutional rights involving fundamental personal liberties are involved[13]—and particularly where as here the hearsay evidence of Lundeberg and the incompetent evidence ascribed to O'Neil is offered in sole support for a

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[11] In a contemporary comment of the Immigration and Naturalization Service, it was recognized that any distinction between deportation and other administrative proceedings if it ever existed no longer obtains—"The Immigration and Naturalization Service", Secretary of Labor's Committee on Administrative Procedure, 1940, at pages 122-3:

> "The reversal in the Supreme Court's attitude toward consideration of the evidence in immigration cases is the single most striking aspect of its general change of approach * * *."

As was said by the Ninth Circuit Court itself, substantial evidence "implies a quality of proof which induces conviction and makes an impression on reason" (*N.L.R.B.* v. *Union Pacific Stages*, 99 F. [2] 153, at 177).

[12] Cf. *Strecker* v. *Kessler*, 95 F. (2) 976—C. C. A. 5, aff'd without modification on this point, 307 U. S. 22, 34; *Ong Chew Lung* v. *Burnett*, 232 F. 853 at 855—C. C. A. 9; *Mason* v. *Tillinghast*, 27 F. (2) 580— C. C. A. 1; *Lisotta* v. *United States*, 3 F. (2) 108, 110-111—C. C. A. 5; *Whitfield* v. *Hanges*, 222 F. 745 at 749, 751—C. C. A. 8; *Ex parte Radivoeff*, 278 F. 227 at 231.

[13] *St. Joseph's Stock Yards Co.* v. *United States*, 298 U. S. 38 at 77; Oppenheimer, Administrative Law, 37 Col. Law Rev. 1 at 30; "Administrative Procedure in Government Agencies", Final Report of the Attorney General's Committee (1941) at 87.

finding (see 2 Pike and Fischer, Administrative Law, 48e, 521-8). Moreover, in the present case there is no occasion for judicial reluctance to intervene on the ground that the administrative findings involved expert judgment in fields foreign to judicial competence.

The Opinions of the Court Below.

The opinions for the majority judges below took a most curious course with respect to the necessary standard of proof. The view originally expressed was that "any" evidence will suffice (p. 15, *supra*). The petitioner then filed a motion for reargument in which the errors of this view were principally urged. Although reargument was denied, the accompanying opinion by Judge Stephens sought to clarify the position originally taken. The opinion states that "there is evidence, more than a scintilla and not unbelievable on its face" (R. 7812)—from which it is said to follow that issues on the evidence do not fall within the judicial province. Under that view, Judge Stephens added, "we have ordered enforced numerous orders for the exclusion and for the deportation of aliens * * *" (R. 7812).

A month later Judge Stephens filed an amendment to this opinion on reargument. The amendment states that the Court was accustomed to applying the views expressed "in habeas corpus proceedings *and reviews from administrative orders*"—i.e. assimilating the scope of review in deportation cases to administrative proceedings generally. But in review of administrative orders even the Ninth Circuit has held that there must be substantial evidence to support the findings (*NLRB* v. *Union Pacific Stages*, 99 F. (2) 153 at 177).

The testimony of Lundeberg alone is relied upon by the majority to sustain the finding of membership, and it is submitted that his testimony does not constitute "substan-

tial" evidence in any intelligible sense of the term. Moreover, the majority overlooked that the Attorney General's findings depended upon *all* the evidence mentioned by him and not upon any single part of the evidence individually. The majority below relied upon Lundeberg alone, making the assumption that the findings must be sustained if *any* of the evidence could be credited, without regard to the fact that the findings were made upon all the evidence. But *Securities and Exchange Commission* v. *Chenery* (318 U. S. 80) establishes that judicial review of an administrative finding may only proceed in the light of the ground actually adopted by the administrative tribunal.

Viewed cumulatively, the surviving evidence relied upon by the Attorney General is only the debris of an elaborate and ambitious structure built upon the testimony of witnesses most of whom were the dregs of the waterfront, and whom the Government should have quickly recognized as such. The Court below was content to accept only a fragment of that debris as sufficient. We submit that the finding against the petitioner upon such evidence or any part of it is arbitrary and violates due process of law.

We turn to the other violations of due process of law committed against the petitioner.

POINT II

Deportation upon the procedures used here offends due process of law.

The making of the findings against the petitioner was not merely without evidence "to fairly sustain" them (*Lewis* v. *Frick*, 233 U. S. 291, 297; *cf. Zakonaite* v. *Wolf*, 226 U. S. 272, 274); it was also accompanied by grave abuses of the fundamental considerations of fairness embodied in our concept of due process.

We have referred to the early departmental investigations of petitioner, in which he was absolved of all charges and to the formal hearing before Dean Landis in which all charges were found baseless, resulting in the cancellation of the warrant of arrest. At the time of the Landis hearings, and because of the decision of this Court in *Kessler* v. *Strecker*, 307 U. S. 22, the deportation statute required a finding that the petitioner was a member or affiliate of a proscribed organization at the time of the issuance of the warrant. Immediately following the final disposition of the first warrant, there was renewed agitation and it resulted in legislative action seeking his deportation.

1. **Legislative action directed to petitioner.** The first attempt was in 1940, through a bill in Congress directing petitioner's deportation "notwithstanding any other provision of law." The bill passed the House, but died in Senate Committee (S. Rep. 2051, 76th Cong., 3rd Sess., H.R. 9766, 76th Cong., 3rd Sess.).

Then on June 29, 1940, Congress adopted the amendment of the law under which the present warrant was issued. Its purpose, both to nullify the ruling in *Kessler* v. *Strecker*, *supra*, and to furnish a ground for further action against petitioner, cannot easily be mistaken. It provides in effect for deportation by reason of *past* membership in or *past* affiliation with a proscribed organization. So far as the petitioner is concerned, the author of the measure, Congressman Hobbs, stated its purpose:

> "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Bridges * * *" (86 Cong. Rec. 9031; see also Hearing before a Subcommittee of the

Committee on the Judiciary, U. S. Senate, 76th Cong., 3rd Sess. on H.R. 5138, p. 11).[14]

2. **Successive hearings as denial of due process.** To subject the petitioner, exonerated by Dean Landis, to a second trial before Judge Sears was in the light of the evidence presented a procedure so unfair as in itself to constitute a denial of due process.

The Government has suggested a formal distinction between the two proceedings—that before Dean Landis the issue was the membership or affiliation of the petitioner as of the issuance of the warrant, while before Judge Sears the issue was his membership or affiliation at any time following his admission to this country. The distinction will not survive examination.

No evidence was offered before Dean Landis as to present membership. All the proof was addressed only to past membership and affiliation, and the Government relied specifically upon a legal presumption of continuance to support its claim with respect to the time of petitioner's arrest in 1938.[15] As Dean Landis' opinion shows, his finding denying present membership or affiliation depends entirely upon

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[14] Earlier there had been hearings upon a resolution seeking impeachment of Secretary of Labor Perkins and other officials in the Labor Department for an alleged conspiracy to refrain from enforcing the deportation law against petitioner (H. Res. 67, 76th Cong., 1st (Sess.). The resolution failed of passage (H. Rep. No. 311, 76th Cong., 1st Sess.; filed Mar. 24, 1939).

[15] The Government's own statement of its case before Dean Landis demonstrates the identity of the two proceedings.

"It is the Government's position that it has shown that prior to the arrest of Harry Bridges he was a member of the Communist Party and has continued as such. It contends, and submits it has been proved, that, the alien having been shown to be a member of the Communist Party, the obligation rested upon him to show that he had ceased to be such member, and in the absence of such showing there is a legal presumption he remained a member, and therefore is subject to deportation under the Act of 1918 as amended" (Government's Brief to Dean Landis, p. 100).

his rejection of the Government's evidence of *past* membership and affiliation (R. 634-6).

The proof itself, in each of the proceedings, followed identical lines. In each proceeding, the Government attempted, unsuccessfully, to prove that the petitioner attended Communist Party membership meetings; the witnesses were different persons, but the purport of their testimony the same. Similarly, proof was offered, in each case, of alleged admissions by petitioner of membership in the Communist Party; again, only the witnesses differed. Even more, the same miscellany of items offered as proof of affiliation with the Communist Party was all presented to and passed upon by Dean Landis (R. 604-7, 626-8). The Government saw fit to present a greater volume of testimony before Judge Sears than before Dean Landis, with respect to the further charge of petitioner's affiliation with the MWIU—principally concerning the "Waterfront Worker". But again all the subjects considered were mooted before Dean Landis; in fact most of the testimony in the first proceeding dealing with the MWIU was read into the record of the second proceeding (R. 75, f. 6, 624-8, 635, 3231 ff.). The Board of Immigration Appeals stated its opinion that "the same factual issues" were tried in both proceedings (432, n. 77). We annex in Appendix C a tabular statement showing how the same lines of testimony were given by the different witnesses in the two proceedings—the testimony covering the years 1934-1938 (*infra*, pp. 71-2).

The precise question here is not whether Dean Landis' findings and rulings were either correct or res adjudicata: it is whether, consistent with the requirements of due process of law, petitioner could be subjected to successive proceedings with respect to these identical matters.

The first hearing was no mere perfunctory proceeding, with only tentative conclusions. It was an extended and far-flung investigation in which the parties were represented by counsel; witnesses were subpoenaed, examined,

and cross-examined; arguments heard and briefs submitted. The suggestion of the Government below, that the proceeding before Dean Landis was in the nature of an inconclusive investigation like that before a committing magistrate, is hardly appropriate. Nor is it relevant to urge, as the Government also urged below, that here were administrative proceedings in which the principles of res adjudicata are often said not to apply. Even if they did not—and we submit on the contrary that they do clearly apply[16]—petitioner's rights must be judged under the due process clause. Surely it is an intolerable proposition that there are no legal restraints upon governmental determination to try the same issues of fact against the petitioner, again and again, upon the same thin evidence, until success is achieved. Otherwise, the governmental force must ultimately prevail—regardless of merit.

Beyond this, petitioner is entitled to the protection of the double jeopardy clause (U. S. Constitution, Fifth Amendment). Deportation proceedings are not merely civil proceedings to which the double jeopardy provision is generally considered not to attach; their consequences run far beyond those flowing from ordinary civil litigation. Deportation "may result also in loss of both property and life; or of all that makes life worth living" (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284, per Brandeis, J.). This has

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[16] Two situations should be distinguished—first, where the prior proceeding was not a fully litigated adversary proceeding but was heard "in a summary way" as in *Pearson* v. *Williams*, 202 U. S. 281 at 284; and second, where the administrative body is specifically charged by statute with the obligation to function in the public interest, and so proceeds without immediate emphasis upon questions of private law (compare *N.L.R.B.* v. *Thompson Product*, 130 F. (2) 363—C. C. A. 6).

On technical principles of res adjudicata—the decision under the statute as amended indisputably turns upon the same facts as were actually litigated before Dean Landis, so that his conclusions would plainly seem controlling in the present proceeding (Restatement of Judgments, sec. 68 esp. comment C).

often been judicially pointed out.[17] Indeed it will have that effect in the present case. Regardless of the form of the proceedings, a *penalty* is here sought to be imposed; thus double jeopardy is threatened within the meaning of the Constitution (*United States* v. *Chouteau*, 102 U. S. 603, *cf. Huntington* v. *Attrill*, 146 U. S. 657; *cf. U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537).

The concepts of double jeopardy and res judicata which in other situations would concededly bar successive proceedings are, we submit, not only specific constitutional protections within their own spheres, however defined, but are inseparable from fundamental due process; as so conceived no ground exists for withholding their protection from petitioner.

3. **Ex post facto operation of the statute as denial of due process.** The proceedings similarly offend common conceptions of fairness embodied in the *ex post facto* clause (Art. I, sec. 9[3]), since the statute was amended on June 28, 1940 with the specific purpose in mind of deporting the petitioner upon grounds admittedly not then existing.

Only upon the frank admission that it proposed to try the same case again, could the Government have renewed proceedings against the petitioner, after Dean Landis' decision. The amendment furnished a pretext for avoiding such an admission. Its effect, however, is not merely *ex post facto* but also retrospective—a distinction the importance of which has been indicated by this Court (e. g., *Bugajewitz* v. *Adams*, 228 U. S. 585). It subjects aliens to

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[17] E. g. *Wallis* v. *Tecchio*, 65 F. (2) 250, C. C. A. 5, classing deportation as "a penalty"; *Browne* v. *Zurbreck*, 45 F. (2) 931, C. C. A. 6; see also Dean Landis at R. 506. "If a banishment of this sort be not * * * among the severest of punishments it would be difficult to imagine a doom to which the name can be applied", Pres. James Madison, 4 Elliott's Debates (1830) p. 363.

deportation for membership in an organization, even though such membership had long since terminated when the amendment was adopted.

It is not necessary to argue here that the *ex post facto* clause applies in full vigor to the case of *any* alien affected by its retrospective operation.[18] It is with respect to this petitioner that the operation of the statute must be viewed. The purpose of the draftsman of the amendment, directed at petitioner, could not be carried out except by reaching back into the past and penalizing a status which, the prior proceedings had established, did not then exist.

Here again considerations of due process of law are clearly involved. Even granting the Government's narrow contentions as to the scope of the *ex post facto* clause, another basic source of the petitioner's protection is the due process clause. "The more limited ex post facto or contract clauses may now be regarded simply as encyclopedic subdivisions of the due process clause" (Shulman, Retroactive Legislation, 13 Encycl. of Soc. Science 355).

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[18] It was ruled below that the *ex post facto* clause applies only to strictly criminal cases. The leading authorities, however, forbid any deprivation of fundamental rights which is based upon conduct antedating the penalizing statute. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *Pierce* v. *Carskadon*, 16 Wall. 234; Cooley, "Constitutional Limitations" (7th Ed. 1903) 375-376; Black, "Handbook of American Constitutional Law" (1927) § 266; Blackstone Commentaries [3d Ed.] 11n.; McAllister, "Ex Post Facto Laws in the Supreme Court of the United States" (1927) 15 Cal. Law Rev. 269, 281-282.

Mahler v. *Eby*, 264 U. S. 32, is relied on as establishing that statutes may apply retrospectively in deportation proceedings. The statute there did not however apply retrospectively, for the decision was that a finding of present undesirability was prerequisite to deportation. The language relied on is therefore *dictum*, which fails moreover to recognize that the consequences of deportation are too serious to permit classifying it as merely a civil judgment (see pp. 29-30, *supra*)—a fact more clear under present day conditions.

4. Resurrection of the MWIU as denial of due process. The charge of affiliation with the MWIU represents a reversal of the Government's settled attitude towards that organization—a reversal made only in the petitioner's case.[19]

Membership in or affiliation with the MWIU has not been deemed cause for deportation since the ruling of the Department of Labor in 1934. Prior to the present proceedings, no alien was ever faced with such a charge—notwithstanding that, before the decision in *Kessler* v. *Strecker*, in 1940, it was believed that either past or present membership constituted cause for deportation; and *since* the proceedings, no alien—except the petitioner—has been charged with past membership in or affiliation with the MWIU (R. 705-715, 733). Only the petitioner has been held deportable for *past* affiliation with an organization which at the time of his affiliation with it had been authoritatively determined not to be included in the ban of the statute.

No legal arguments, however nice, concerning the power of the Department in 1934 to construe the statute so as to exclude any organization now found to be a proscribed organization can obscure the fact that there are today thousands of aliens in the United States who have been members of or affiliated with the MWIU, and other TUUL affiliates.[20] Clearly the statute has here been intentionally applied in a discriminatory manner.

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[19] The warrant was simply in the language of the statute (R. 772-3). It was not until the opening day of trial that the Government disclosed that it was relying upon affiliation with the MWIU (R. 807-8). In prior hearings doubtless because of the Department's 1934 ruling, no such charge was made.

[20] The concept of equal protection is embraced in due process (compare *U. S. v. Yount*, 267 Fed. 861 at 863, D. C. Pa.); and due process of law may be denied equally by administrative interpretation or by legislation. *Yick Wo* v. *Hopkins*, 118 U. S. 356; compare *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20 at 35-6.

5. **The O'Neil incident as denial of due process.** Judge Sears placed reliance upon the alleged O'Neil evidence (R. 271). No one else has done so, other than the Attorney General (R. 92-6). The Board of Immigration Appeals rejected it (R. 451-461). The District Court ruled it out without hesitation (R. 753-5); and the Court below merely declined to invalidate the order because of the acceptance of this "additional evidence of less probative value" than Lundeberg's testimony (R. 778).[21] Judge Healy's trenchant observations adequately sum up this phase of the case (p. 15, *supra*).

A. The evidence ascribed to O'Neil was incompetent. Plainly the petitioner was deprived of any opportunity to cross-examine: the only testimony that O'Neil gave was that he had never made the statement put to him concerning the petitioner's assertions of membership in the Communist Party. There was nothing here for the petitioner to challenge. Yet the alleged statement, made out of court, not sworn to, repudiated by its alleged author, and originally accepted (even then erroneously) as impeaching evidence only (R. 525-6-7), has been transmuted into affirmative proof against the petitioner.

The Government's contentions as to the competency of this evidence are fully met in the opinion of the Board of Immigration Appeals which made a careful and comprehensive review of the authorities (R. 451-461). There is no decision which suggests that such a statement may be used as evidence where the witness denies having made the statement.

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[21] Mr. Attorney General Biddle took the view that he would accept the findings of Judge Sears because Judge Sears saw and heard the witnesses (R. 96). This is a truism of appellate practice hardly applicable here, for O'Neil's alleged statement upon which Judge Sears relied was not given under Judge Sears' observation. All that Judge Sears heard was O'Neil's denial.

The evidence was more than merely incompetent. The fact is rather that the evidence is vicious in tendency and that to accept it and rely upon it is to commit that "flagrant" error which the present Chief Justice indicated in *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106, would demonstrate the essential unfairness of the proceedings (see also *Tang Tun* v. *Edsell*, 223 U. S. 673; *Tisi* v. *Tod*, 264 U. S. 131, and cases cited at pp. 133-4). The practice here followed would obviously permit of outright manufacture of evidence without effective opportunity for challenge.

The evidence is offensive to fundamental conceptions of what constitutes due process of law not only because of the absence of opportunity for effective challenge, —it also had a prejudicial effect which pervaded consideration of the entire case. It purports to be the only surviving *circumstantial* rather than hearsay evidence of the petitioner's membership in the Communist Party. Once credited, it could not fail to cause repercussions far beyond its own immediate purport, affecting the views of the trier of the facts upon the other evidence offered and in relation to the petitioner's own testimony.

The differences between the findings of Judge Sears and Dean Landis may well be ascribed to the prejudicial consequences of this most improper proof. Offered originally only to show that O'Neil was not telling the truth, it has been magnified so that with the evidence of Lundeberg it constitutes the only point upon which the finding of membership rests.

B. Violation by Mr. Attorney General Biddle of the Department's own rules is also clear. Those rules were adopted as part of the recent studied expansion of the administrative powers of the Immigration Service (Rules 150.1(c) and 150.6(i); Appendix, pp. 60, 65-6). They limit

the manner in which *ex parte* statements may be taken and used in deportation proceedings; any statement procured during an investigation must be taken down in writing under oath and signed by the witness who must be informed of its prospective use as evidence. Although the Government argued to the contrary in the court below, the Attorney General conceded that the rules had been violated (R. 95).

The Attorney General sought to dispose of the violation on the ground that the rules were not specifically called to the attention of Judge Sears. But Mr. Attorney General Biddle was not entitled to rule, as an appellate court might do, that therefore the petitioner "waived the right to object" (R. 96). Judge Healy, dissenting below, quite properly observed that the rules

> "were called to the Attorney General's attention. One is left to wonder on what ground that high official condoned his own disregard of them. Upon him rested the inescapable responsibility of accepting or rejecting the evidence, as of ordering the deportation. The rules were obligatory on him if on anybody" (R. 7806).

Due process of law is denied when the Department violates its own rules (*U. S. ex rel. Bilokumsky v. Tod*, 263 U. S. 149 and especially authorities cited at 155 n. 3; *Ohm v. Perkins*, 79 F. (2) 533, C. C. A. 2). Here such violation resulted in the acceptance of evidence, offered without the traditional safeguards for testing truth and necessarily prejudicial to the whole case. Flagrant error was thereby committed.

6. **Rejected evidence "taken as a whole" as denial of due process.** Upon an assumption as to the nature of proof for which we can find neither precedent nor parallel, Mr. Attorney General Biddle also gave weight to the evidence of witnesses whose testimony Judge Sears had declined to credit.

Judge Sears rejected the testimony of seven witnesses who placed the petitioner at Communist meetings. The testimony of one of these was found to be "inherently improbable" (R. 310); of another Judge Sears said he "clearly falsified" (R. 307); and of the rest he held, as Mr. Attorney General Biddle summarized it, their testimony was "inconclusive, unreliable or contradictory" (R. 97).

The Attorney General, nevertheless, ruled as follows:

> "Although Judge Sears concluded that their evidence, for one reason or another, did not establish membership in or affiliation with the Communist Party, taken as a whole, it cannot, because of its volume, be completely disregarded" (R. 98).

The ruling, it is submitted, cannot be explained on any ground consistent with a genuine desire to accord the petitioner the fair consideration required by due process of law.

7. **The Government's conduct as denial of due process.** The atmosphere throughout the proceeding before Judge Sears was inexcusably one of red-baiting. A host of unfounded charges against witnesses and counsel, and attacks on their evidence and documents, were made solely on the basis of alleged Communist domination. We cannot here rehearse the full details. A quotation from the Government's brief will serve to illustrate the obscurantist nature of the Government's approach in the matter:

> "BRIDGES was and is a serpent, slithering into the trade union movement from a dark, unwholesome den of the past to practice in the movement the treacherous tactic of hypocrisy and deceit and to form with his 'comrades' a tyranny therein that might compare in its exercise of power with that most vicious one in Soviet Russia, where 9,000,000 human beings were slaughtered as a single project in

the most cruel and inhuman program in the history of the world." [22] (Gov't Reply Brief to Presiding Inspector, p. 39.)

This attitude was reflected in the proof offered and in the evidence withheld by the Government. (a) It was learned during the course of the trial that witnesses had given statements to the Government inconsistent with the testimony they gave at the hearing (R. 1358; 1360, 1362, 1367; 745). Judge Sears believed he was without power to direct the Government to produce any documents, and he left the production of these statements to the discretion of Government officials. Counsel thereupon refused to produce them. This kind of concealment on the part of the Government, by suppression of documents, has always been condemned (Chief Justice Cooley in *People* v. *Davis*, 52 Mich. 569; *People* v. *Schainuck*, 286 N. Y. 161, 8 Wigmore Evidence, sec. 2224). In the language relied on by Dean Landis "ordinary considerations of fairness" (R. 507, n. 15) required that the Government produce these statements. (b) The Government presented the false testimony of its witness Cannalonga, which evidence was procured during his detention in "protective custody" (R. 6708-17) and in circumstances pointing to foreknowledge of its falsity.[23] (c) It was discovered that the Government was resorting to illegal wire tapping against petitioner after the hearings (R. 341-5).

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[22] Similar attacks were made on the CIO: R. 1232, 1301-2, 2468, 925; compare R. 7687, 1732, 5672, 3803-3, 3921-3, 3960-1, 4551-2, 5059, 7496-7. The Government's briefs were vituperative; see Government's opening brief, pp. 239, 252, 258, 259; reply brief, p. 155. Armed guards were present at the trial, and FBI agents maintained a constant watch over defense attorneys.

[23] Cannalonga testified against the petitioner on April 17 (R. 1769-1909). On May 4 he gave a deposition under oath to petitioner's counsel in which he repudiated his testimony (Alien's Ex. 13, R. 3523-41). On May 7 a subpoena for his forthwith appearance was issued on petitioner's request (Alien's Ex. 48). Cannalonga dis-

(Footnote continued on next page)

8. **Mr. Attorney General Biddle's procedure as denial of due process.** The determination of the Board of Appeals was rendered on January 3, 1942 (R. 367). Mr. Biddle's decision was announced publicly on May 28, 1942 (R. 106). He had given no indication in the interval that he had the matter under consideration. Accordingly, there was no opportunity for counsel to appear before him and present arguments either orally or in writing. Since the oral argument before the Board was not taken down stenographically, the Attorney General could only have acted without benefit of the views of petitioner's counsel except to the extent that he may have had before him one or more of the briefs filed with Judge Sears or the Board of Immigration Appeals. The Attorney General did not confine his consideration to questions of law. He considered the facts in detail and as shown he took into consideration evidence which had theretofore been rejected (R. 97-8).[24] He also enunciated a theory of waiver (R. 94)

appeared, and was not found until May 29 (R. 6969-70). On the following day an FBI agent served him with the subpoena (R. 6694-6701). Instead of producing Cannalonga the FBI took him into "protective custody" for the next four days during which they obtained a statement repudiating his deposition (R. 6704-6717). He was produced by the Government on June 4 and presented as a Government witness (R. 6648). His story was that he had been drunk when he made his first repudiation (R. 6682-3)—a story which Judge Sears found to be clearly false (R. 307). The Government, however, had in its possession evidence showing the falsity (Alien's Exs. 59; see also Alien's Exs. 60, 61): Cannalonga's work slips for the day in question, as well as the record of an interview by Immigration inspectors of the stenographer who took Cannalonga's deposition (R. 7517).

[24] The powers of the Board of Immigration Appeals were recently reconstituted in the departmental reorganization in 1940. In that reorganization: "The title of the Board of Review was changed to that of the Board of Immigration Appeals, and it was made a larger body with quasi-judicial jurisdiction and to a degree independent of this service." (Annual report of the Attorney General of the United States, Fiscal year ended June 30, 1941, at p. 225.) Yet the Attorney General overruled the findings without himself hearing argument on them.

not previously suggested. In these circumstances the petitioner had the right to an opportunity to reach the mind of this public official who undertook to dispose finally of his case upon findings less favorable to him than those to which he had previously had opportunity to address himself (*Morgan* v. *United States*, 304 U. S. 1; 304 U. S. 23; 298 U. S. 468). Petitioner's right to be represented by counsel before the official who finally decides is elementary (compare *Glasser* v. *U. S.*, 315 U. S. 60, at 76). These considerations were emphasized when subsequently Mr. Attorney General Biddle denied a petition for a "hearing or rehearing."

The second *Morgan* case (304 U. S. 1; id. at 23) established that due process of law forbids any administrator from making a final determination against a party without giving him fair opportunity, by service upon him either of an intermediate report or of proposed findings, to learn of any new conclusions proposed to be reached against him and to furnish his arguments in answer. The rules of the Department itself emphasize this requirement for a hearing. In any case in which oral argument has not previously been had, the alien is afforded opportunity to present argument on any finding made by the Board less favorable than the recommendation below (Rule 90.11). Simple fair play dictates such a rule, which should have controlled the deliberations and actions of Mr. Attorney General Biddle.

In sum: the proceedings against this petitioner, viewed in their completeness, constitute a gross and cumulative abuse of due process of law. The petitioner, who has been the object of determined and persistent attention since 1934, was subjected to a trial on charges in 1940 notwithstanding that previous departmental investigations had disclosed no basis for action against him. That trial was conducted in a scrupulously careful and thorough manner, and it too resulted in findings fully in his favor. Nevertheless the underlying statute was amended specifically so as

to permit of further proceedings against him, and as a result of the amendment, the petitioner was subjected to a second trial in which the same issues of fact were tried partly upon identical testimony and for the rest upon identical lines of proof. Plainly these proceedings ignored all considerations of fairness underlying the double jeopardy and *ex post facto* provisions of the Constitution. Moreover they were conducted in an atmosphere of hostility and prejudice. They depended in large measure upon resurrection of charges long overruled with respect to the MWIU; a resurrection, moreover, devised particularly for this case, and not since used against any other of the several thousand aliens in the same situation. The department's own rules were disregarded. The Attorney General did not see fit to hear the petitioner through his counsel. The Government resorted to marginal procedures and dubious evasions of ordinary understanding of due process of law at every step. And although some forty witnesses have appeared in the two proceedings against the petitioner, the case against him on the facts rests essentially upon the admittedly biased and self-contradicted testimony of Lundeberg and upon evidence ascribed to O'Neil which it was flagrant error to accept for any purpose. A finding against petitioner upon such testimony, in view of its paucity and its unreliability, is to substitute arbitrary fiat for reasoned conviction. The petitioner has been denied due process of law.

POINT III

The statute as construed and applied denies petitioner freedom of speech and association guaranteed by the First and Fifth Amendments.

It was denied below that the First and Fifth Amendments protect the petitioner from deportation for his exercise of the rights of freedom of speech and of associa-

tion there guaranteed.[25] It was further urged by the Government that in any event the statute could constitutionally be applied, in the light of the finding of petitioner's membership in and affiliation with the Communist Party and his affiliation with the MWIU.

So far as the adequacy of the finding of membership to support the constitutional application of the statute is concerned—the Government made this explicit concession (R. 1527):

> "* * * we are not charging this witness with believing in the advocacy of the overthrow of the Government of the United States by force and violence.
>
> "We are not charging the alien here with believing in the use of force and violence in the overthrowing of the Government of the United States."

There is, moreover, no proof that the petitioner understood that the Communist Party believed in or advocated violent overthrow of government—and there is no proof that any clear and present danger existed that advocacy by the Communist Party of violent overthrow of government might have been successful. In these circumstances, to deport petitioner for bare *membership* is to find guilt by imputation, for mere association, and is in contravention of the First and Fifth Amendments.

The same conclusions follow from the evidence presented to show petitioner's *affiliation* with the Communist Party and the MWIU (discussed above, pp. 17-21). The statute cannot constitutionally be applied to such proof as here involved. The proof is no more than that petitioner sought cooperation in pursuit of legitimate trade-union

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[25] The District Court wrote paradoxically: "If the result is a curtailment of their [aliens'] freedom of speech while in this country, it is a curtailment consonant with the constitutional guarantees of the Bill of Rights" (R. 737). The court below did not see fit to discuss the constitutional issues here considered.

aims, as indeed Dean Landis determined upon virtually the same proof. "Bridges' aims are energetically radical", he said, but "the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits" (R. 635).

1. Petitioner's Rights under the Constitution.

According to the Government, "the First Amendment is inapplicable * * *" (brief below, p. 21). Presumably its position would be the same with respect to the Fifth Amendment to the extent that it guarantees liberty of conduct and association. The argument strikes at the tenure of the three and one-half million aliens lawfully resident in this country.

The Government does not challenge that, deportation aside, aliens are fully entitled to the rights guaranteed under the Constitution and specifically to rights of free speech.[26]

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[26] The doctrine was fully stated in *Lem Moon Sing* v. *United States*, 158 U. S. 538:

> "While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States" (p. 547).

For example: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (Fourteenth Amendment); *Wong Wing* v. *United States*, 163 U. S. 228 (Fifth Amendment); *Li Sing* v. *United States*, 180 U. S. 486 (Fifth Amendment); *Downes* v. *Bidwell*, 182 U. S. 244 at 282-3; *Truax* v. *Raich*, 239 U. S. 33 (Fourteenth Amendment); *Terrace* v. *Thompson*, 263 U. S. 197 at 216 (Fourteenth Amendment); *Russian Fleet* v. *United States*, 282 U. S. 481 (deprivation of property only upon just compensation, under Fifth Amendment).

The alien's rights of free speech are recognized in *Abrams* v. *United States*, 250 U. S. 616, and in *Hague* v. *CIO*, 307 U. S. 496.

Because some constitutional guarantees as to judicial procedure are not available in deportation cases,[27] it does not follow that the guarantees of free speech, or of liberty generally, are also precluded.

Congress may "exclude or expel all aliens * * * absolutely or upon certain conditions" (*Fong Yue Ting* v. *United States*, 149 U. S. 698 at 711; *Ng Fung Ho* v. *White*, 259 U. S. 276; *United States* v. *Smith*, 289 U. S. 422). But the exercise of that power, like every other general power expressly or impliedly granted, is necessarily subject to scrutiny as to "whether the manner in which Congress has exercised this right * * * is consistent with the Constitution" (*Fong Yue Ting* v. *United States*, *supra*; *cf. Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336).

Recent decisions have defined some of the boundaries of free speech—there is the right, in the absence of a showing of clear and present danger to our institutions, to speak freely in public places, however unpopular the views there expressed may be (*Taylor* v. *Mississippi*, 319 U. S. 583; *Hague* v. *CIO*, 307 U. S. 496); to utter religious propaganda (*Cantwell* v. *Connecticut*, 310 U. S. 296); and to distribute handbills or pamphlets, either from house to house, or in public places (*Schneider* v. *State*, 308 U. S. 147; *Martin* v. *Struthers*, 319 U. S. 141). There is the right to picket (*Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769); and to criticize the courts (*Bridges* v. *California*, 314 U. S. 252[28]). Is Congress free to deprive an alien of these

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[27] *Wong Wing* v. *United States*, 163 U. S. 228; *Li Sing* v. *United States*, 180 U. S. 486; *Lo Wah Suey* v. *Backus*, 225 U. S. 460; *Zakonaite* v. *Wolf*, 226 U. S. 272; *Ng Fung Ho* v. *White*, 259 U. S. 276; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149.

[28] This decision involved the present petitioner. The Government's position would seem necessarily to be that Congress would be competent to deport him for the conduct which in that case this Court held was done under the protection of the Constitution.

rights deriving from the First and Fifth Amendments by threatening deportation on pain of surrender of those rights? (Compare *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Frost* v. *Railroad Commission of California*, 271 U. S. 583).

The Government argues that *Turner* v. *Williams*, 194 U. S. 279, establishes that Congress may do so. This was not, however, a case of deportation, but one in which an alien who had illegally entered the country ten days before the warrant, was excluded. Of course a non-resident alien, illegally here, cannot claim constitutional guarantees. This Court made the distinction clear when it stated that "those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens *or otherwise*" (p. 292).

The Government's contention that it will be "anomalous" if "Congress could not provide for the deportation of aliens bent on the overthrow of the Government by force • • •" (Gov. brief below, p. 21)[29] not only begs the question, it is also a poorly disguised denial of the fundamental principles underlying the guarantee of free speech. The premises upon which that right has been guaranteed do not admit of a distinction between aliens and citizens. Democratic institutions must stand or fall upon the free exchange of ideas. Our ruling concepts must be capable of surviving the test of free discussion in the market place. The quality of an idea is not affected by whether it is urged by alien or citizen.

In periods of reaction the first point of attack is upon minorities and particularly upon aliens. The argument of the Government in this case can be turned against any group of aliens, and would permit deportation for any form of conduct—religious, political or economic—guaranteed as part of our fundamental liberties.

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[29] Compare the Government's concession with respect to the alien, *supra*, p. 41.

2. "Affiliation" has been Construed so as to Deny the Petitioner Due Process of Law and Free Speech.

Dean Landis recognized (R. 512-3), upon the authorities, that the statute does not interdict either mere association with Communists or the entertaining of beliefs in sympathy with those maintained by the Communist Party; that it does not apply where the connection between the alien and the proscribed organization, even when amounting to cooperation, is casual, spasmodic or intermittent; that affiliation implies some relationship of permanence, of mutual reliance and dependence, "which, though not equivalent to membership duty, does rest upon a course of conduct which could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith" (*Kettunen* v. *Reimer*, 79 F. (2) 315, 317, *per* Chase, J.; see also Dean Landis at R. 513 and cases there cited, including *Tolsky* v. *Wilson*, unreported opinion by Judge Learned Hand, June 27, 1920).

In the present proceeding the concept of affiliation has been expounded in a manner not heretofore understood. The element of permanence has particularly been ignored. Judge Sears does not seem to have been guided by any principle, but proceeded simply upon the vague premise that the trier of facts must somehow determine where the weight of the evidence lies (R. 249-51; 326-38). Mr. Attorney General Biddle did not specifically discuss his understanding of the meaning of affiliation; and, as Judge Healy said below, "he appears to have relied indiscriminately on every circumstance which might be thought to spell sympathy or to be indicative of an association however temporary and in pursuit of ends however legitimate" (R. 7803).

We have already stated the substance of those circumstances (pp. 17-21, *supra*)—the petitioner accepted the cooperation of the MWIU; he aided in the editing and

publishing of the Waterfront Worker; he resisted red-baiting in the affairs of his trade union; and he is said to have made statements evincing sympathy with some of the aims and purposes of the Communist Party. He permitted publication of Communist releases in a trade union newspaper—but again, as in all his activities, because those releases worked to the benefit of his union.

The statute must fall, under the First and Fifth Amendments, when it is construed and applied so as to proscribe legitimate activities of this nature. Activity itself legitimate cannot be condemned, under the Constitution, though it be carried on in conjunction with the Communist Party (*DeJonge v. Oregon*, 299 U. S. 353; *Stromberg v. California*, 283 U. S. 359; and *cf.* the concurring opinion of Brandeis, J., in *Whitney v. California*, 274 U. S. 357). Nor does the statute define and measure the offense against which it is directed. It "sweeps within its ambit" (*Thornhill v. Alabama*, 310 U. S. 88, 97) a wide range of legitimate activity. So vague and broad an overhanging threat to the exercise of liberties guaranteed under the Constitution will not be sanctioned; speaking technically, due process of law is denied because the statute is indefinite and so applies ambiguously and indifferently to proper forms of behavior.[30]

Even if it were more precise than it is, it would constitute a practical denial of the right of free speech, since its exposition and its implementation in matters affecting expression of ideas are left to enforcement officers.[31] "The

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[30] *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Taylor v. Mississippi*, 319 U. S. 583; *cf. DeJonge v. Oregon*, 299 U. S. 353.

[31] *cf. Thornhill v. Alabama*, 310 U. S. 88; *DeJonge v. Oregon*, 299 U. S. 353; *Carlson v. California*, 310 U. S. 106; *Taylor v. Mississippi*, 319 U. S. 583; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242.

statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone * * *" (*Herndon* v. *Lowry*, 301 U. S. 242 at 263).

Further, there is missing here the finding of clear and present danger to our institutions, in the absence of which the utterances imputed to petitioner through his associations may not constitutionally be proscribed (*Cantwell* v. *Connecticut*, 310 U. S. 88 at 104-5). The right of free speech "is subject to restriction * * * in order to protect the State from destruction or from serious injury, political, economic or moral." Such a situation arises only where "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent" (*Whitney* v. *California*, 274 U. S. 357, concurring opinion of Brandeis, J. at 373-4). That situation is not presented here, and no finding was made concerning it.

3. Deportation for Membership only, without Proof of Advocacy, Knowledge or Belief, Violates Freedom of Speech and Association.

It is immaterial whether the statute be judged on its face or as applied to the facts of the present case (*cf. Thornhill* v. *Alabama*, 310 U. S. 88 and *Carlson* v. *California*, 310 U. S. 106). In either event essential elements are lacking: that the petitioner either personally advocated improper doctrines, or believed in them, or at the very least understood the Communist Party so to advocate. There is not even proof that he ever attended a Party meeting. Consequently the statute on its face and as applied goes even further than to attack his right to hold beliefs when unaccompanied by overt action of any nature. It condemns him for the offense of association, and directs his deporta-

tion because of an imputation from the bare finding of membership—itself resting on the flimsiest of evidence.[2]

It is fundamental to our conception of due process of law that "guilt is personal" (*Schneiderman v. United States*, 320 U. S. 118, 154 footnote 41 quoting Chief Justice [then Mr.] Hughes). The observation is most apposite in political matters. The dogma of any party varies from time to time. It is unfair to define it even by the considered utterances of the party leaders, assuming the consistency of their writings. It is for these reasons that the *Schneiderman* case dealt once and for all a death blow to the spurious doctrine of guilt by imputation—even though there the petitioner was secretary of the Party and active in its affairs.

None of the earlier authorities sustains the propriety of such an imputation. In previous cases the accusation has been of personal advocacy of clearly proscribed doctrines (e. g. *Schenck v. United States*, 249 U. S. 47; *Pierce v. United States*, 252 U. S. 239; *Gitlow v. New York*, 268 U. S. 652), or of possession for distribution of proscribed mate-

[2] Some of the decisions in the Circuit Courts of Appeals have gone very far in authorizing deportation for membership in the Communist Party even where the alien did not subscribe to any proscribed doctrines and undertook only legitimate trade-union activities (e. g. *Greco v. Haff*, 63 F. (2) 863—C. C. A. 9; *Jurgans v. Seaman*, 25 F. (2) 35—C. C. A. 8; *United States v. Wallis*, 268 F. 413, S. D. N. Y.; *cf. Murdoch v. Clark*, 53 F. (2) 155—C. C. A. 9; compare however opinion of Hutcheson, J. in *Strecker v. Kessler*, 95 F. (2) 976). All assume the propriety of the imputation in the face of the proof, and none of them treat of the clear and present danger test.

This Court has not passed on the question of whether an alien is deportable for membership in the Communist Party or even any of the T.U.U.L. unions. In the *Boric* case (habeas corpus dismissed, 4 F. Supp. 965, appeal dismissed 67 F. [2] 1020) certiorari had been granted (290 U. S. 623) but was dismissed on request of the alien's attorney (290 U. S. 709) *after* the Immigration Service had reversed itself and determined that the alien should not be deported for membership in the National Miner's Union, one of the T.U.U.L. unions.

rial with knowledge and understanding of its contents (*Tisi* v. *Tod*, 264 U. S. 131; *cf. Taylor v. Mississippi*, 319 U. S. 583). In *Whitney* v. *California*, 274 U. S. 357, the accused was one of the Party's organizers who remained active in its affairs after knowledge of the unlawful purposes to which it was found to have been dedicated. It was in that case that Mr. Justice Brandeis challenged the proposition that "assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment" (274 U. S. at 379).

Petitioner's situation presents that question. He is not personally implicated either by conduct or by belief in any Communist Party doctrine. Bare identification with a proscribed organization—for example by speech-making under Party auspices—cannot constitutionally under the due process clause be deemed culpable (*Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *cf.* Brandeis, J. in *Whitney* v. *California*, 274 U. S. 357; and *Schaefer* v. *U. S.*, 251 U. S. 466).

There is a further infirmity in the application of the statute. As we have said (p. 47, *supra*), the recent decisions establish the constitutional impropriety of interdicting any form of conduct, by utterance or otherwise, in the absence of "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[33] There is no claim here of any imminent or serious threat.

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[33] *Schenck* v. *United States*, 249 U. S. 47 at 52; *Herndon* v. *Lowry*, 301 U. S. 242; *Hague* v. *CIO*, 307 U. S. 496; *Carlson* v. *California*, 310 U. S. 106; *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287; *Bridges* v. *California*, 314 U. S. 252; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Martin* v. *Struthers*, 319 U. S. 141; *Taylor* v. *Mississippi*, *supra*; *cf.* Brandeis, J. in *Whitney* v. *California*, 274 U. S. 357 at pp. 374-8.

The Government is therefore confined to reliance upon the so-called presumption as to the validity of an implied legislative finding that such danger exists (see *Gitlow* v. *New York*, 268 U. S. 652). At the very most such a declaration has only presumptive and not conclusive weight (opinion of Brandeis, J., *Whitney* v. *California*, 274 U. S. 357, 372; see *Hague* v. *CIO*, 307 U. S. 496 at p. 516). It is unavailing, for example, if applied to activity otherwise legitimate even though such activity be carried on under the auspices of a proscribed organization (*Whitney* v. *California*, 274 U. S. 357; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Fiske* v. *Kansas*, 274 U. S. 380). Actually, as has been repeatedly stated, in matters affecting fundamental rights of free speech, no presumption of constitutionality obtains, and this Court will be "astute to examine the effect of the challenged legislation" (*Schneider* v. *State*, 308 U. S. 147 at 161) "* * * in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity". (*Prince* v. *Massachusetts*, 321 U. S. 158, 167).

The presumption of legislative validity is in any event not applicable to a statute like the present which must be considered vague and uncertain.[*]

Here is not a statute which has placed a specific class of words "upon an expurgatory index", or indicted "a particular form of doctrine, carefully defined and after such definition denounced on reasonable grounds as fraught with peril to the state" (*Herndon* v. *Georgia*, 295 U. S. 441 at 450). Rather, this statute condemns utterances "by reference to the results that they are likely to induce" (*Herndon* v. *Georgia*, 295 U. S. 441 at 450); "readily lends itself

[*] The statute under consideration here is plainly more uncertain and indefinite than the ordinance classified by this Court as "sweeping and inexact," in *Carlson* v. *California*, 310 U. S. 106, at 112.

to harsh and discriminatory enforcement by local prosecuting officials"; and "results in a continuous and pervasive restraint on all freedom of discussion * * *" (*Thornhill* v. *Alabama*, 310 U. S. 88 at 97-8). Here the statute condemns the bald fact of membership; it embraces any form of words, not actually defined, which may in the opinion of the local official be deemed to have a proscribed content.

Conclusion

This case presents important constitutional issues involving rights of free speech and association. The searching and fundamental question is presented whether aliens lawfully resident in this country are free to conduct themselves in reliance upon the constitutional guarantees concededly extended both to citizens and to aliens not being subjected to deportation proceedings—not merely the guarantees of speech, but also of religious and political beliefs. The case presents the further question, important under present conditions, whether deportation will be permitted to follow upon presentation of "any" evidence. The conclusion to deport petitioner, an end so persistently sought for a decade by vindictive private groups, has been reached through flagrant abuses of due process of law—both in the basic conception of the present proceedings involving successive hearings, dissolved relationships, and discriminatory legislation and administration; and in the manner in which the issues were tried and determined.

Judge Healy, dissenting below, correctly expressed the epitome of these proceedings:

> "Rather than deport the alien on evidence which would be condemned and proscribed without hesitation by any American court, it would seem a more forthright procedure to do what was proposed in the first place,

deport him by legislative resolution 'notwithstanding the provisions of any other law' " (R. 7809).

Respectfully submitted,

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Appendix A—The Statute

Act approved October 16, 1918 as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:

(a) Aliens who are anarchists;

(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage:

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2)

the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

For the purpose of this section: (1) the giving, loaning or promising of money or anything of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or anything of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U. S. C. 137).

SEC. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States. (40 Stat. 1012; 54 Stat. 673; 8 U. S. C. 137.)

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Appendix B—The Regulations

Code of Federal Regulations of the United States of America

Part 90—Departmental Organization and Authority

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§ 90.1 **Commissioner of Immigration and Naturalization and other selected officials; powers.**—Under the general direction of the Attorney General, the Commissioner of Immigration and Naturalization (hereinafter called the Commissioner) shall supervise and direct the administration of the Immigration and Naturalization Service and, subject to the limitations of other provisions of this Part, shall have authority to exercise all powers of the Attorney General relating to the administration of that Service and the administration of the immigration, nationality, and all other laws administered by that Service and shall designate such officers of the Service as he may select, with the approval of the Attorney General, to exercise any power or authority of the Attorney General in the administration of any designated specific provision of such laws. In any instance in which any officer so selected shall be in doubt as to the construction of applicable law or as to the proper principle covering the exercise of discretion, he shall refer the matter to the Commissioner, who shall, after receiving the advice of the General Counsel, either advise as to the appropriate decision, make decision in his own name, or refer the matter to the Attorney General for decision.*

*§§ 90.1 to 90.50, inclusive, issued under the authority contained in sec. 28, 34 Stat. 606, 45 Stat. 1515, 8 U. S. C. 356, sec. 23, 39 Stat. 892, 8 U. S. C. 102; sec. 24, 43 Stat. 166, 8 U. S. C. 222; sec. 1, Reorg. Plan No. V, 5 F. R. 2132, 2223; sec. 37(a), Pub. No. 670, 76th Cong., 3d sess.; sec. 161, 360 R. S., 5 U. S. C. 22, 311.

90.2 Board of Immigration Appeals. The Board of Review of the Immigration and Naturalization Service is transferred to the Office of the Attorney General. The Board shall hereafter be known as the Board of Immigration Appeals. In the exercise of the powers conferred upon it the Board of Immigration Appeals shall be responsible solely to the Attorney General. There shall be attached to the Board of Immigration Appeals in the Office of the Attorney General a Chief Examiner and such number of examiners as the Attorney General, upon the recommendation of the Board, shall from time to time direct. In the absence of a member of the Board, the Chief Examiner shall have authority to act as member. The Board shall have authority to promulgate, with the approval of the Attorney General, rules of practice governing the proceedings before it, including rules as to the admission and conduct of attorneys practicing before it. The Board shall have authority, with the approval of the Attorney General, to disbar any attorney or other person from appearing in a representative capacity before the Board or before any officers of the Immigration and Naturalization Service.*

90.3 Board of Immigration Appeals; powers. (a) Subject to the provisions of § 90.12 of this Part, the Board of Immigration Appeals in behalf of the Attorney General shall have authority:

(1) To issue orders of deportation after proceedings in accordance with law and regulations; to order the cancelation of warrants of arrest issued in such proceedings; and in connection therewith to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of deportation proceedings.

* For statutory citation, see note to § 90.1.

(2) To consider and determine appeals from decisions of boards of special inquiry in exclusion or preexamination cases, and to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of such appeals.

(3) To consider and determine all cases of fines and penalties against steamship companies or other carriers for violations of the immigration laws, to recommend to the Assistant Attorney General in charge of the Criminal Division the prosecution of violators of section 10 of the Immigration Act of 1917, and to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of such cases.

(4) to consider and determine all advance applications for the admission of aliens under the Seventh and Ninth Provisos to section 3 of the Immigration Act of 1917.

(b) In any of the cases enumerated in this section in which no exception has been filed to the proposed action of the Service a single member of the Board of Immigration Appeals shall have authority, subject to the provisions of § 90.12 of this Part, to act for the Board in reviewing and signing the Board's decision. In all other cases decisions shall be by a majority of the Board; and the decision of the Board shall be evidenced by the signature of its chairman. Whenever any member of the Board shall disagree with the majority, he shall record his dissent, together with his reasons therefor.*

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90.5 [illegible]d of Immigration Appeals; oral argument in deportation cases. Oral argument shall be heard, upon request, by the Board of Immigration Appeals in any deportation case in which exceptions have been taken by or in

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*For statutory citation, see note to § 90.1.

behalf of the alien to the proposed findings of fact, conclusions of law and order of the presiding inspector. At the time of filing such exceptions, an alien or his counsel or representative shall state whether or not an opportunity for oral argument is desired and shall specify a date for such argument. The time for oral argument shall be fixed not less than 3 days nor more than 18 days after the date on which the exceptions are filed, except in cases where the alien is detained at the expense of the Government in which cases oral argument shall be set not more than 5 days from the date of the filing of exceptions. The Board of Immigration Appeals may, in its discretion, upon good cause shown in an application by the alien or his counsel or representative, grant permission to file exceptions and requests for oral argument after the time fixed by the officer in charge for such filing has expired. The Board shall have authority, upon its own motion or upon request, to fix or to change the date upon which oral argument is to be heard.*

90.11 Board of Immigration Appeals; service of proposed findings, conclusions of law and order. Whenever, in any deportation case in which no exceptions have been taken to the proposed findings, conclusions of law and order of the presiding inspector, the Board of Immigration Appeals after consideration of the record believes that an order less favorable to the alien than that proposed by the presiding inspector should be entered, it shall prepare its own proposed findings of fact, conclusions of law, and order and shall forward them to the district director of the district in which the case arose for service upon the alien or his counsel or representative. The alien

* For statutory citation, see note to § 90.1.

or his counsel or representative shall be given opportunity, within a time fixed by the Board of Immigration Appeals, to file exceptions to the proposed findings, conclusions, and order of the Board. If exceptions are filed, further procedure in the case shall be in accordance with the provisions of § 90.5 hereof. If no exceptions are filed within the time prescribed, the proposed findings, conclusions, and order of the Board of Immigration Appeals shall, subject to the provisions of § 90.12 hereof, be made final.*

90.12 Board of Immigration Appeals; reference of cases to the Attorney General. In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision. In any case in which the Attorney General shall reverse the decision of the Board, or in any case in which suspension of deportation is ordered pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, the Attorney General will state in writing his conclusions and the reasons for his decision.*

* For statutory citation, see note to § 90.1.

Part 150—Arrest and Deportation

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§150.1 (a) Investigation of aliens reported, or believed, to be subject to deportation. The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) Investigations; purpose. The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists: that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) Investigations; interrogation of aliens under investigation. All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding.

(d) Investigations; refusal to make recorded statement under oath or affirmation. Whenever, in the course of an investigation, admissions or statements are obtained from an alien or statements are made by any other person which indicate that the alien may be subject to arrest and deportation, but the alien or other person refuses to make

a recorded statement under oath or affirmation or refuses or is unable to sign the recorded statement, by name or by mark, the investigating officer shall make a report in writing to the officer in charge, setting forth the facts admitted or stated as to the alien's status under the immigration laws. This report may be used in support of an application for a warrant of arrest, when the investigating officer certifies that no other evidence to establish the facts stated in the report can be readily obtained. Statements obtained in confidence may be included in such report, without disclosure of their source, only if the officer in charge certifies that in his belief such statements are trustworthy.

(e) Investigations; anonymous information. Information received from a person whose name or address is not disclosed to the investigation officer or is known or appears to be fictitious shall not be used to support an application for a warrant of arrest. Such information shall be used only as a guide to obtaining competent evidence to support the facts alleged.

(f) Investigations; extent of interrogation. Where an alien under investigation, after reasonable questioning, makes no admissions which bring him within a deportable class, interrogation shall cease, and the investigating officer, if he still believes that the alien is subject to deportation, shall attempt to secure from other sources the necessary evidence.*

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150.6 (a) Hearing; when to be accorded under warrant. After the alien has been taken into custody under a war-

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* §§ 150.1 to 150.14, inclusive, issued under authority contained in sec. 23, 39 Stat. 892, 8 U. S. C. 102; sec. 24, 43 Stat. 166, 8 U. S. C. 222; sec. 1, Reorg. Plan No. V, 5 F. R. 2223; sec. 37 (a), 54 Stat. 675, 8 U. S. C. 458; 8 CFR 90.1. Statutes interpreted or applied and statutes giving special authority are listed in parentheses at the end of specific sections.

rant of arrest and has been given a reasonable time to arrange for his defense, including, if desired, representation by counsel, and after the formal warrant of arrest has been received, if arrest was accomplished under a telegraphic warrant, the alien shall be granted a hearing to determine whether he is subject to deportation on the charges stated in the warrant of arrest. A hearing under a telegraphic warrant of arrest, and prior to the receipt of the formal warrant of arrest, shall be held only on the request of the alien or his counsel, or when, in the discretion of the officer in charge, it is deemed impracticable to await the receipt of the formal warrant. The alien shall be informed of his right to request a hearing upon a telegraphic warrant prior to the receipt of the formal warrant.

(b) Hearing; presiding inspector to be other than investigating officer. The immigrant inspector assigned to conduct a hearing under a warrant of arrest shall be referred to as the "presiding inspector." The immigrant inspector who conducted the investigation in the case shall not act as presiding inspector unless the alien consents thereto. The presiding inspector shall rule upon all objections to the introduction of evidence or motions made during the course of the hearing. In cases to which no examining inspector has been assigned pursuant to the provisions of paragraph (n) of this section, the presiding inspector shall conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest. The presiding inspector shall see that all documentary or written evidence is properly identified and introduced into the record as exhibits by number, unless read into the record. He shall further make sure that, subject to the provisions of paragraphs (d), (e), and (g) of this section, the record is a verbatim report of everything that is stated

during the course of the hearing, including the oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record with the consent of the alien or his counsel.

(c) Hearing; procedure; notice of charges. At the beginning of a hearing under a warrant of arrest, the presiding inspector shall (1) permit the alien to inspect the warrant of arrest and inform him of the charges contained therein by repeating them verbatim and explaining them in language which will clearly convey to the alien the nature of the charges he must answer; (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; (3) place the alien under oath or affirmation; (4) advise the alien of the penalty for perjury; and (5) enter of record as an exhibit, identified by number, the formal warrant of arrest, or a decoded copy of the telegraphic warrant if hearing is held thereunder. The presiding inspector shall further advise the alien of the provisions of paragraph (g) of this section concerning applications for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended, in all cases except those in which the alien is charged with being subject to deportation upon one of the grounds mentioned in section 19 (d) of the said Act. A continuance of the hearing for the purpose of obtaining counsel shall not be granted more than once, unless sufficient cause for the granting of more time is shown.

(d) Hearing; representation by counsel. If counsel be selected, he shall be permitted to be present during the hearing, to offer evidence to meet any evidence presented or adduced by the Government, and to cross-examine wit-

nesses called by the Government. Counsel shall be permitted to state his objections succinctly, and they shall be entered on the record. Argument of counsel in support of his objections shall be excluded from the record. Counsel, however, may submit such argument in the form of a brief to accompany the record.

(e) Hearing; where representation by counsel waived. If representation by counsel be waived the alien shall be permitted to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine witnesses called by the Government, and to make objections, which shall be entered on the record, but his arguments in support of the objections may, in the discretion of the presiding inspector be excluded from the record, in which event, however, the alien shall be permitted to submit such arguments in writing to accompany the record.

(f) Hearing; interpreters. Where the services of an interpreter are found necessary in the conduct of a hearing, the interpreter, if not an employee of the Service, shall be sworn to interpret and translate accurately.

(g) Hearing; application for departure in lieu of deportation or for suspension of deportation. At any time during the hearing the alien may give notice that he wishes to apply for the privilege of departing from the United States to any country of his choice at his own expense in lieu of deportation or for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended. Such application may be made in the alternative for either type of relief, and a request for the privilege of preexamination may be made in conjunction with a request for the privilege of departure in lieu of deportation. The alien's application shall be made in writing under oath or affirmation on Form I-255 accompanied by General Information Form I-55, duly verified, which

shall be filed in duplicate with the presiding inspector. The original copy of such application and General Information Form, when received, shall be attached to and made a part of the record. The alien shall be warned that any statements made by him in such application or General Information Form may be used as evidence in any proceeding to determine his right to enter, reenter, pass through or reside in the United States and that false answers to any of the questions in such application or General Information Form may bar him from the relief which he requests. The presiding inspector may in his discretion assist the alien in filling out the General Information Form by explaining the questions to him, or he may ask the alien each question directly and record his answer upon the form, or he may require the alien to fill out the form and submit it to him within a reasonable period of time after the conclusion of the hearing. Explanations during the hearing or the reading of questions from the General Information Form need not be made a part of the record of the hearing.

(h) Hearing; order in which evidence shall be presented. The presiding inspector or examining inspector when interrogating the alien at the hearing, shall develop in order (1) the facts concerning his alienage and (2) the evidence relating to the charges in the warrant of arrest or to any additional charges applicable. If the alien has applied or given notice of intention to apply for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b), or 150.10 of this Part, the presiding inspector shall inquire thoroughly into all questions relating to the alien's eligibility to the relief requested insofar as such inquiry is necessary to supplement the General Information Form.

(i) Hearing; use of statements or admissions made during investigation. A recorded statement made by the alien

(other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.

(j) Hearing; record to contain personal history. All records of hearings shall fully set forth, either in the General Information Form if filed or otherwise, the name or names of the alien (correctly spelled); place of the alien's birth; the name of the nearest town of importance to such place of birth; the province and country in which such place is located; the alien's religion; the names and locations of churches or schools he has attended; the last address of the alien in his native country, in the country of which he is a citizen or subject, and in the country in which he has last resided; the country in which he embarked for the United States or for foreign contiguous territory; correct names and addresses and the citizenship or nationality of the alien's nearest relatives residing in the country of his birth, and correct names and addresses of all near relatives residing in the United States.

(k) Hearing; physical or mental disability cases; record to contain medical certificate. The record of the hearing accorded an alien who is suffering from any mental or serious physical disability shall be supplemented by a medical certificate showing (a) whether such alien is in condition to be deported without danger to life or health.

and (b) whether he will require special care and attention in case of deportation overseas.

(l) Hearing; additional charges. If, during the hearing, it shall appear to the presiding inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is subject to deportation, he shall notify the alien that such additional charge is lodged against him, and shall proceed with the hearing upon such charge in like manner as on charges contained in a warrant of arrest.

(m) Hearing; alien to be warned of disabilities respecting reentry to the United States. Before the hearing is concluded, the alien shall be warned by the presiding inspector that the Act of March 4, 1929, as amended, provides that any alien who, after arrest and deportation or departure from the United States in pursuance of an order of deportation, enters or attempts to enter the United States, shall be guilty of a felony, and upon conviction shall be liable to imprisonment for not more than two years or a fine of not more than $1,000, or both, such fine and imprisonment, unless such entry or attempted entry is made after one year from the date of such departure or deportation, and the alien, prior to his reembarkation at a place outside of the United States or prior to his application in foreign contiguous territory for admission to the United States, has been granted by the Attorney General permission to reapply for admission to the United States.

(n) Hearing; assignment of examining inspector in addition to presiding inspector; duties of inspectors. The officer in charge of the district in which the hearing is to be held may, in his discretion, assign a second immigrant inspector to act at the hearing as the "examining inspector". The examining inspector shall conduct the actual interrogation of the alien and of the witnesses in

behalf of the Government and the examination or cross-examination of the alien's witnesses, present such evidence as is necessary to support the charges in the warrant of arrest, lodge such additional charges as he may find applicable in the manner hereinbefore directed, and, if the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b), or 150.10 of this Part, inquire thoroughly into the alien's eligibility for such relief. The presiding inspector in such cases, shall exercise all functions not herein assigned to the examining inspector, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a proper hearing is accorded to the alien.* (Sec. 19, 39 Stat. 889, 54 Stat. 671; 8 U. S. C. 155; Sec. 1, 45 Stat. 1551, 46 Stat. 41, 47 Stat. 166; 8 U. S. C. 180, 181.)

150.7 (a) Proposed findings, conclusions and order; preparation by presiding inspector. As soon as practicable after the hearing has been concluded, the presiding inspector shall prepare a memorandum setting forth a summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order.

(b) Proposed findings, conclusions and order; eligibility for departure in lieu of deportation or for suspension of deportation. If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b) or 150.10 of this Part, the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order. He shall then state in numbered paragraphs his proposed

* For statutory citation, see note to § 150.1.

findings of fact and his proposed conclusions of law as to the alien's eligibility for the relief requested.

(c) Proposed findings, conclusions and order; proposed order. In the proposed order the presiding inspector shall recommend cancelation of the proceedings, deportation, departure under order of deportation, departure in lieu of deportation, or suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing.

(d) Proposed findings, conclusions and order; service of findings of presiding officer. A copy of the presiding inspector's memorandum containing his discussion of the evidence, proposed findings of fact, proposed conclusions of law and proposed order shall be furnished to the alien or his counsel in all instances by personal service, if practicable, otherwise by registered mail, and a return receipt therefor shall be obtained. A copy also shall be furnished to the examining inspector, if an examining inspector has been assigned to the case.

(e) Proposed findings, conclusions and order; filing of exceptions. The alien or his counsel or representatives shall be allowed by the officer in charge a reasonable time (not to exceed 10 days except on showing of good cause that more time is necessary) in which to file exceptions to the proposed findings, conclusions, and order of the presiding inspector and to submit a brief, if desired. Reasonable extensions of time for the filing of exceptions or brief may be granted in the discretion of the officer in charge. The examining inspector shall promptly file exceptions to the proposed findings, conclusions and order of the presiding inspector, or state in writing that he waives the filing of exceptions.*

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* For statutory citation, see note to § 150.1.

For the duration of the War which the United States declared existed against Japan on December 8, 1941, and against Germany and Italy on December 11, 1941, alien seamen who entered the United States on or after September 1, 1939, or who shall hereafter enter the United States and against whom deportation proceedings have been or may be instituted shall be allowed a period of 3 days in which to file exceptions or waive the filing of exceptions to the proposed findings, conclusions, and order of the Presiding Inspector to submit a brief, if desired, in lieu of the time specified in § 150.7 (e) of this title. If oral argument before the Board of Immigration Appeals is requested in behalf of such alien seamen, the time for such argument shall be fixed not more than 3 days from the day notice was given to the alien of the proposed findings, conclusions, and order of the Presiding Inspector in lieu of the time specified in § 90.5 of this title.

Appendix C—Tabular Comparison

First Hearing

Charges: After he entered the United States he became and now is a member of or affiliated with an organization, association, society or group that believes in, advises, advocates and teaches the overthrow by force and violence of the government of the United States" (named as the Communist Party in Government's Bill of Particulars.)

Name of Gov't Witness	Type of Testimony Given*	Years to Which Testimony Relates	Cities to Which Testimony Relates**
Milner	a, c, d, e	1935-6	Se, Po
Leech	a	1936	SF
Sapiro	d, e	1936-7	SF, LA, NY
Humphreys	a	1935-Aug. 1938	SF, LA
Leppold	f	1935-7	SF
Stark	e	1935	Se
Allen	a	1937	SF
Howard	b, e, f	1936-7	SP, Se
Detrich	b, c, d, e, f	1933-6	SF
Engstrom	a	1936-7	SP, Se
Davis	a, d	1935-6	SF, Se
Castor	a	1936	Se
Mrs. Castor	a	1936	Se
Mrs. Davis	a	1934	Se
Marcus	a	1934	SF
Kessler	a	1934	SF
Mickleson	a	1934	SF
Zanazzi	a	1934	SF
Penaat	e	1934	SF
Bridges, (called as witness by Gov't)	c	Dec. 1932-1938	——
Total, 20	a, b, c, d, e, f	Dec. 1932 to Aug. 1938	SF, Se, Po, LA, NY, SP

* Abbreviations used in this column are as follows: a—alleged attendance of Bridges at Communist meetings; b—alleged admission by Bridges of Communist membership; c—associations of Bridges with Communists; d—alleged Communistic remarks by Bridges; e—hearsay statements concerning Bridges; f—opinion evidence of witness.

** Abbreviations used in this column are as follows: Se—Seattle; Po—Portland; SF—San Francisco; LA—Los Angeles; NY—New York; Fr—Fresno; SP—San Pedro.

Charges: "After entering the United States he has been a member of or affiliated with an organization, association, society or group that believes in, advises, advocates or teaches the overthrow by force or violence of the government of the United States" (named as the Communist Party in Government's Opening Statement).*

Name of Gov't Witness	Type of Testimony Given	Years to Which Testimony Relates	Cities to Which Testimony Relates
Lundeberg	b	1935	SF
O'Neil	b, d	1937	SF
Barlow	d	1935	Se
Lovelace (Mr. and Mrs.)	e, f	1935	Po
McCuistion	e	1936	NY
Innis	e	1936	SF
Rushmore	d	1935	NY
Chase	d, e	1937	LA
Diner	a	1934	Fr
Honig	a	1936-7	SF
Lawrence	a	1934	LA
Cannalonga	a	1936-7	SF, Se
St. Clair	a, e	1935-6	SF
Wihuri	a, b, e	Apr. 1938	Po
Thompson	a	1934-5	NY
Kelley	d	1937	Se
Bridges (Govt. introduced in evidence excerpts from Bridges' testimony at first proceeding)**	e	Dec. 1932-1938	—
TOTAL, 18	a, b, e, d, e, f	Dec. 1932 to Apr. 1938***	SF, Se, Po, LA, NY, Fr

* Additional charges lodged against appellant at the hearing, based on his brief membership in 1921 in the Industrial Workers of the World, are now immaterial, inasmuch as the Attorney General found that such membership did not render appellant deportable. (R. 100.) The charge of deportability for affiliation with the MWIU is, while new, a by-product of the Communist charge, and is also subject to other legal infirmities.

** This evidence deals with appellant's association with the MWIU during the 1934 strike, the aid offered to appellant's union by the Int'l Labor Defense, the aid given by the Communists in the 1934 strike, appellant's associations with Communists, and appellant's policy of non-discrimination in labor unions by reason of political beliefs. See R. 431-432, n. 77, referred to in the opinion of the court below. (R. 732.)

*** One item of evidence introduced by the Government, involving a strike at the North American Aviation Company, related to the year 1941. It is immaterial at this time since the Attorney General found that this evidence did not show either membership in or affiliation with the Communist Party, but only a "sympathetic attitude